Supreme Court, U.S.
FILED
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No. 02-1672

IN THE

Supreme Court of the United States

RODERICK JACKSON,

Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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Petition for Certiorari Filed May 13, 2003
Certiorari Granted June 14, 2004

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CHRONOLOGICAL LIST OF DOCKET ENTRIES

I. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA (Case No. 01-CV-1688)

7/27/01	COMPLAINT filed, amount paid $150, receipt # 200 167107 (sj) [Entry date 07/27/01]
7/27/01	REQUEST of plaintiff for service by certified mail filed (sj) [Entry date 07/27/01]
7/30/01	SUMMONS and COMPLAINT issued by certified mail as to dft Bham Board of Ed (sj) [Entry date 07/30/01]
7/30/01	AMENDED Complaint filed by pla Roderick Jackson [1 - 1]; jury demand filed cs (sj) [Entry date 08/01/01]
8/7/01	SUMMONS and complaint returned executed: upon defendant Birmingham Board of Ed on 8/6/01 filed (sj) [Entry date 08/08/01]
8/16/01	SUMMONS and Amended Complaint issued by certified mail (sj) [Entry date 08/17/01]
8/21/01	SUMMONS and complaint returned executed: upon defendant Birmingham Board Ed on 8/20/01 filed (pg) [Entry date 08/21/01]
9/10/01	MOTION by dft Birmingham Board Ed to dismiss filed cs (sh) [Entry date 09/11/01]

9/13/01 RESPONSE by plaintiff Roderick Jackson to dft's motion to dismiss [6-1] filed cs (sj) [Entry date 09/14/01]

10/9/01 BRIEF (REPLY) by dft Birmingham Bord of Ed in support of its motion to dismiss filed 9/10/01 (doc. # 6) filed cs (sj) [Entry date 10/09/01]

10/17/01 REPLY by pla Roderick Jackson to dft's reply brief [8-1] filed cs (sj) [Entry date 10/19/01]

10/23/01 ORDER that dft's motion to dismiss is SET FOR HEARING; In-Court Hearing SET for Tues 11/6/01 @ l0am Courtroom 2A. Hugo L Black Courthouse, Bham AL filed (by Magistrate-Judge T M Putnam) cm (sj) [Entry date 10/23/01]

10/29/01 ORDER that dft's motion to dismiss (doc.#6) is ready for submission to court for decision; parties are reminded that they may consent to the exercise of full & final jurisdiction by the undersigned w/consent form attchd filed (by Magistrate-Judge T M. Putnam) cm (sj) [Entry date 10/29/01]

11/6/01 COURTROOM NOTES: HEARING on Motion by dft to Dismiss (TMP) - Court's preliminary remarks - Counsel's arguments - WRITTEN ORDER to be entered by the Court - (Karla Johnson, Court Reporter) (rld) [Entry date 11/06/01]

1/8/02 NOTICE of appearance for dft Birmingham Board Ed by Melissa D Evans as co-counsel filed cs (kc) [Entry date 01/08/02]

1/10/02 Report and Recommendation recommend motion to dismiss be granted; objs to R&R to be filed w/in 15 days filed (by Magistrate-Judge T M. Putnam) cm (kc) [Entry date 01/10/02]

1/17/02 OBJECTIONS by pla Roderick Jackson to R&R [13-1] filed cs (kc) [Entry date 01/18/02]

1/17/02 BRIEF - memo of law in support of obj to R&R by pla Roderick Jackson filed cs (kc) [Entry date 01/18/02]

1/23/02 REMARK - objs sent to randomly drawn Judge Propst (kc) [Entry date 01/23/02]

1/24/02 ORDER (Submission) that objection (Doc #14) will be deemed submitted 2/19/02; Responsive Brfs Due by 2/7/02, Reply Brfs Due by 2/19/02 , filed (Judge Robert B. Propst) cm (sl) [Entry date 01/24/02]

2/4/02 BRIEF by dft Birmingham Board Ed in support of Magistrate's R&R filed cs (kc) [Entry date 02/05/02]

2/25/02 MEMORANDUM, opinion, and order filed (by Judge Robert B. Propst) Case reassigned to Judge Robert B. Propst adopting Report and Recommendation [13-1], granting motion to dismiss [6-1], dismissing case cm (kc) [Entry date 02/25/02]

3/5/02 NOTICE of appeal by pla Roderick Jackson from District Court decision [18-3] ; notice of appeal, order appealed from and court copy of docket entries letter mailed cm (ko) [Entry date 03/06/02]

3/5/02 APPEAL fee received in amount of $105 (ko) [Entry date 03/06/02]

3/5/02 Appeal Information Sheet (yellow copy) filed [19-1] (ko) [Entry date 03/06/02]

3/7/02 CERTIFICATE of readiness issued, cm (de) [Entry date 03/07/02]

3/18/02 NOTIFICATION by Circuit Court of Appellate docket number 02-11303B (ko) [Entry date 03/18/02]

6/10/02 CERTIFIED Record on Appeal with certified copy of docket entries and transmittal mailed to USCA cm (sj) [Entry date 06/10/02]

1/22/03 CERTIFIED copy of Appellate Court order filed on 10/21/02 and issued as mandate of court 1/21/03: affirming the decision of the District Court [19-1] filed w/certified copy of slip opinion att; original 1 vol record rec'd (Dubina, Marcus and Goodwin, Circuit Judges) (kl) [Entry date 01/22/03]

II. UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (Case No. 02-11303-BB)

3/5/02 Fee Status: Paid (03/05/02) for Roderick Jackson

3/11/02 Transcript order form - no transcript requested: Appellant-Jackson, Roderick

3/11/02 Certificate of Readiness

3/12/02 Appearance Form Submitted: Kenneth L. Thomas

3/12/02 Appearance Form Submitted: Valerie L. Acoff

3/13/02 DKT2 (Docketing - Regular Notice) issued. cc: Mathis, Perry D. cc: Brooks, Hycall, III cc: Brooks, Charles Isaac To: Braxton, Toni Jacqueline cc: Thomas, Kenneth L. cc: Acoff, Valerie L. cc: Coley, Darnell Delacey cc: Evans, Melissa D.

3/14/02 Probable Jurisdiction Noted: Appellant-Jackson, Roderick

3/15/02 BR1CIV (Brief Letter 1) issued. cc: Thomas, Kenneth L. cc: Acoff, Valerie L. cc: Brooks, Hycall, III cc: Brooks, Charles Isaac cc: Braxton, Toni Jacqueline cc: Coley, Darnell Delacey cc: Evans, Melissa D.

3/15/02 Briefing Notice Issued: 4/22/02

3/22/02 Appearance Form Submitted: Charles Isaac Brooks

3/22/02 Appearance Form Submitted: Toni Jacqueline Braxton

4/12/02 Appellant's Brief Filed: Appellant-Jackson, Roderick (Atty: Toni Jacqueline Braxton)

4/12/02 Record Excerpts

4/23/02 Motion to Withdraw as Counsel: Appellant Attorney-Brooks, Charles Isaac: Appellant Attorney-Braxton, Toni Jacqueline

5/2/02 Party Removed From Case: Charles Isaac Brooks

5/2/02 Party Removed From Case: Toni Jacqueline Braxton

5/2/02 Appellant's counsel, The Brooks Firm, P.C. 's motion to withdraw is GRANTED. smg

5/2/02 MOT2 (Motion - Court Action) issued. cc: Brooks, Charles Isaac To: Braxton, Toni Jacqueline cc: Thomas, Kenneth L. cc: Acoff, Valerie L.

5/7/02 Over the Phone Extension to File answer Brief Granted by REG Until 5/21/02

5/21/02 Appellee Brief Filed: Appellee-Birmingham Board of Education (Atty: Valerie L. Acoff)

6/03/02 Over the Phone Extension to File Reply Brief Granted by JPC Until 6/13/02-Appellant-Roderick Jackson (Pro Se)

6/12/02 Reply Brief Filed: Appellant-Jackson, Roderick (Pro Se)

6/12/02 Record on Appeal

9/27/02 Oral Argument Scheduled: 09/27/02

9/30/02 Appellant Pro Se; Valerie L. Acoff argued for Appellee

10/21/02 Judgment Entered

10/21/02 OPIN1A (Opinion - Issuance with Costs) issued. Each party to bear own costs. cc: Jackson, Roderick cc: Thomas, Kenneth L. cc: Acoff, Valerie L. cc: Propst, Robert B. cc: Putnam, T. Michael

10/21/02 Opinion Issued

11/12/02 Petition for Rehearing En Banc: Appellant-Jackson, Roderick (ProSe)

11/15/02 WRAP-1 (Wrappers w/ addresses) issued. cc: Goodwin, Alfred T.

1/13/03 The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition(s) for Rehearing En Banc are DENIED.

1/13/03 REHG1 (Rehearing - Transmittal) issued. cc: Jackson, Roderick cc: Thomas, Kenneth L. cc: Acoff, Valerie L.

1/21/03 CASE CLOSED-Mandate Issued

1/21/03 Mandate Issued

1/21/03 MDT1 (Mandate - Issuance) issued. cc: Jackson, Roderick cc: Thomas, Kenneth L. cc: Acoff, Valerie L. To: Perry D. Mathis cc: Putnam, T. Michael

4/4/03	Ext. for Filing Certiorari - Granted on 3/31/03 (application #02A829), extended the time to and including May 13, 2003.
5/20/03	Notice of Filing Certiorari: (ProSe) 02-1672
10/20/03	Checked Status of Cert. - Pending
11/21/03	Checked Status of Cert. - Pending
12/22/03	Checked Status of Cert. - Pending
1/22/04	Checked Status of Cert. - Pending
3/1/04	Checked Status of Cert. - Pending
4/1/04	Checked Status of Cert. - Pending
5/3/04	Checked Status of Cert. - Pending
6/2/04	Checked Status of Cert. - Pending
7/2/04	Granted as of 7/1/04:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RODERICK JACKSON, Plaintiff. v. BIRMINGHAM BOARD OF EDUCATION, Defendant.	Case No: CV-01-TMP-1866-S

Amended Complaint

Comes now the plaintiff in the above-styled cause and says as follows:

I. Jurisdiction

1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1331, 1343(a)(1)-(4), 2201 and 2202, 20 U.S.C. §1681 *et seq*. This is a suit authorized and instituted pursuant to Title IX of the Act of Congress known as the "Education Amendment Act of 1972, as amended." The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by 20 U.S.C. §1681 *et seq.*, as amended, providing for injunctive and other relief against gender discrimination and/or retaliation.

2. The plaintiff have fulfilled all conditions precedent to the institution of this action under Title IX of the Act of Congress known as the "Education Amendment Act of 1972," as amended.

II. Parties

3. Plaintiff, Roderick Jackson (hereafter referred to as "Jackson") is an African American, citizen of the United States and a resident of Jefferson County, Alabama. He was employed by the defendant at its Jefferson County, Alabama locations at the time of the alleged acts of discrimination.

4. Defendant, Birmingham Board of Education, (hereafter referred to as "The Board") is an entity subject to suit under Title VII of the Act of Congress known as the "Education Amendment Act of 1972 *et seq.*, as amended." The defendant employs at least Five Hundred (500) persons.

III. Cause of Action: Title IX and 20 U. S. C. § 1681 et. seq., as amended by The Civil Rights Act of 1991 Retaliation Gender Discrimination

5. The plaintiff re-alleges and incorporates by reference paragraph 1-4 above with the same force and effect as if fully stated in specific detail herein below.

6. The defendant discriminated on the basis of gender against the plaintiff, Roderick Jackson, with respect to his employment contract by refusing to contract with plaintiff on terms free of gender bias with respect to adverse terms, conditions, and privileges of employment, in violation, among other laws 20 U.S.C. § 1681 *et seq*, as amended.

7. On or about August 1993 plaintiff was hired as a Physical Education Teacher and Coach. On or about August 1999 plaintiff was transferred to Ensley. Plaintiff's direct supervisor was Evelyn Baugh. On or about December 2000, plaintiff complained to Ms. Baugh about gender discrimination in association with the girls' basketball. Plaintiff also noted serious infractions with regards to the expense accounts. Plaintiff also noted the girls were prohibited from using various equipment including but not limited to the sports facility. The girls team was not

provided a key for the padlock for the facility. Soon thereafter plaintiff received negative evaluations.

8. Plaintiff was subjected to adverse terms of employment because of gender discrimination. Plaintiff was subjected to a work conditions which were limited in enforcement to individuals in a protected class, female.

9. Plaintiff was terminated on May 7, 2001.

VII. Prayer for Relief

WHEREFORE, Premises Considered, plaintiffs respectfully pray that this Honorable Court assume jurisdiction of this action and after trial provide relief as follows:

1. Issue a declaratory judgement that the employment practices, policies, procedures, conditions, and customs of the defendant are violative of the rights of the plaintiff as secured by Title IX and, 20 U.S.C. § 1681, as amended

2. Grant the plaintiff a permanent injunction enjoining the defendant, its agents, successors, employees, attorneys and those acting in concert with the defendant and that the defendant's request from continuing to violate Title IX and, 20 U.S.C. §1681, as amended.

3. Enter an order requiring the defendant to make the plaintiff whole by awarding him back-pay, front pay, nominal, compensatory and punitive damages. Plaintiff also requests any loss of work-related benefits, including but not limited to pension, healthcare, 401(k), vacation pay, holiday pay, compensatory time or any other benefit no matter how it is denoted by the defendant.

4. Plaintiff further prays for such other and further relief and benefits as the cause of justice may require, including, but not limited to, and award of costs, attorney fees and expenses incurred by this litigation.

PLAINTIFFS DEMAND TRIAL BY STRUCK JURY

Respectfully submitted,

/s/ Hycall Brooks, III
Hycall Brooks, III, Atty. Code BRO107

/s/ Charles I. Brooks
Charles I. Brooks, Atty. Code BRO167

/s/ Toni J. Braxton
Toni J. Braxton, Atty. Code HOR034

The Brooks Firm, P. C.
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(205) 320-0005

Defendant's Address:
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2015 Park Place North
Birmingham, AL 35203

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RODERICK JACKSON, Plaintiff, vs. BIRMINGHAM BOARD OF EDUCATION, Defendant.	CIVIL ACTION NO.: CV-01-TMP-1866-S

DEFENDANT'S MOTION TO DISMISS

COMES NOW the Defendant, Birmingham Board of Education (hereinafter "Board"), and moves this Court, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, to dismiss this lawsuit. In support of its Motion, and without waving any other position that might be asserted at a later time, the Board states as follows:

FACTS

1. In July 2001, the Plaintiff filed a Complaint against the Board. Plaintiff's Complaint is not the model of clarity. Construing the Complaint in a light most favorable to the Plaintiff, it appears that the Plaintiff is attempting to assert a claim that the Board discriminated against him on the basis of his gender in violation of "Title IX and 20 U.S.C. § 1681,"[1] and a retaliation claim.

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[1]Title IX is codified at 20 U.S.C. § 1681, *et seq*.

2. The Plaintiff makes a broad reference to Title VII, but he does not state a Title VII claim or cause of action. Furthermore, the Plaintiff never filed an EEOC charge, which is a prerequisite to filing a Title VII lawsuit.

3. On July 30, 2001, the Plaintiff filed an Amended Complaint. The Board cannot ascertain what, if any, change was made in the Amended Complaint.

4. In his Amended Complaint, the Plaintiff alleges that he complained about gender discrimination in association with the girls basketball team. Specifically, he alleges that the girls team was not provided a key for the padlock for the sports facility, and they were prohibited from using certain equipment.

5. The Plaintiff makes no specific allegations as how the Board discriminated against him on the basis of his gender. He alleges that he received "negative evaluations" and that he "was terminated on May 7, 2001." (Amended Complaint at Paragraph 9). This is not true. The Plaintiff is still employed with the Board.

6. Plaintiff seeks both compensatory and punitive damages against the Board.

ARGUMENT

I. PLAINTIFF LACKS STANDING TO ASSERT A TITLE IX CLAIM

Plaintiff's Title IX claims are due to be dismissed as a matter of law because Plaintiff lacks standing to assert a Title IX claim. The Plaintiff lacks constitutional standing to assert individual claims based on many of the practices for which he seeks relief. As a result, the Plaintiff lacks constitutional standing as well as representative capacity pursuant to Fed. R. Civ. P. 23(b), to assert claims based on those practices on behalf of a plaintiff class, that is, the

female basketball team. *E.g., Grin v. Dugger,* 823 F.2d 1476, 1482-91 (11th Cir. 1987).

> Under elementary principles of standing, a plaintiff must allege and show that [he] personally suffered injury. If [he] cannot show personal injury, then no article III case or controversy exists, and a federal court is powerless to hear [her] grievance. This individual injury requirement is not met by alleging that injury has been suffered by other, unidentified members of the class to which the plaintiff belongs and which [he] purports to represent. Thus, a plaintiff cannot include class action allegations in a complaint and expect to be relieved of personally meeting the requirements of constitutional standing, even if the persons described in the class definition would have standing themselves to sue. A named plaintiff in a class action who cannot establish the requisite case or controversy between [him]self and the defendants simply cannot seek relief for anyone — not for [him]self, and not for any other member of the class.

Griffin, 823 F.2d at 1483 (quotations and citations omitted).

> Moreover, it is not enough that a named plaintiff can establish a case or controversy between [him]self and the defendant by virtue of having standing as to just one of many claims [he] wishes to assert. Rather each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim

The Plaintiff does not contend that he was personally aggrieved by any practice or alleged gender discrimination. The Plaintiff's allegations consist of the following:

(a) he complained about expense accounts;

(b) the girls' team was not provided with a key to the padlock for the sports facility;

(c) the girls were prohibited from using various equipment;

(d) he was subjected to work conditions which were limited in enforcement to individuals in a protected class, female;

(e) he received negative evaluations; and

(f) he was terminated on May 7, 2001.

As previously stated, the Plaintiff's statement in his pleadings that he was terminated is not true. He is still employed with the Board. Also, the Plaintiff could not have received multiple negative evaluations after December 2000 because the academic school year ended in May 2001 and the new academic school year just commenced. Thus, he would have been evaluated only once, if at all, after December 2000. Thus, the two (2) allegations of discrimination that are even remotely related to the Plaintiff are moot. The other allegations pertain to females on the basketball teams who are not a party to this lawsuit, and who have not put the Board of notice a Title IX claim or violation. The Plaintiff has not suffered an injury from the remaining alleged practices.

Thus, Plaintiff's lack of personal injury from the practices alleged deprives him of standing to assert those as violations, either on behalf of himself or as representative of a class. *E.g., Jones v. Firestone Tire and Rubber Company, Inc.*, 977 F.2d 527, 531-34 (11th Cir. 1992); *Griffin*, 823 F.2d at 1482-84.

II. PLAINTIFF FAILS TO STATE A CLAIM UNDER TITLE IX

The Plaintiff has failed to state a claim for relief under Title IX due to his failure to allege how the Board discriminated against him on the basis of their sex. To state a claim for relief under Title IX, a plaintiff must allege that he or she was discriminated against on the basis of sex. *John Does v. Covington Co. Sch. Bd.*, 969 F. Supp. 1264, 1274 (M.D. Ala. 1997). Importantly, this means the plaintiff must make a prima facie case of sex discrimination. *John Does*, 969 F. Supp. at 1274. Here, the Plaintiff's Complaint is devoid of the necessary factual allegations of gender discrimination to support even an inference of sex discrimination against him.

The condition precedent of a prima facie case or inference of sex discrimination for Title IX claims is predicated upon the purpose of Title IX itself–to be free from discrimination on the basis of sex. Thus, it follows logically that, "to maintain a cause of action under Title IX, a plaintiff must allege facts which demonstrate he or she was demonstrated against on the basis of sex." *John Does*, 969 F. Supp. at 1274. In the instant case, the Plaintiff is a male coach for the girls' basketball team. There is no mention of any facts which gave rise to the alleged discriminatory acts or the alleged violations committed by the Board against the Plaintiff on the basis of his gender. In fact, the pleadings are void of any reference or allegation of how *he* was discriminated against personally, only that the *girls basketball team* was discriminated against by a Principal. In other words, the Plaintiff makes no specific allegations, whatsoever, as to how the Board discriminated against him on the basis of *his* gender.

Based on the foregoing, the Plaintiff has failed to state a claim for relief under Title IX and such claims are due to be dismissed as a matter of law.

III. PLAINTIFF'S TITLE IX CLAIM IS DUE TO BE DISMISSED BECAUSE TITLE VII PROVIDES PLAINTIFF'S EXCLUSIVE REMEDY

The Plaintiff's Title IX claim is due to be dismissed because Title VII is the exclusive remedy for allegations of employment discrimination on the basis of sex in federally funded educational institutions. *See, Floyd v. Waiters*, 133 F.3d 786 (11th Cir. 1998); *accord, Waid v. Merrill Area Public Sch.*, 91 F.3d 857 (7th Cir. 1996). Title VII is the appropriate mechanism to the extent that it alone provides sufficient remedies for the allegations the Plaintiff mistakenly attempts to assert under Title IX. The administrative nature of Title VII sets forth the requirement that claimants pursue their claims in an administrative forum, namely the Equal Employment Opportunity Commission (EEOC), as a condition precedent to proceeding with their claims to federal court. Plaintiff has attempted to circumvent the administrative requirements of Title VII by bringing his claims of employment discrimination under Title IX. As Title VII is the exclusive legislatively created remedy available to the Plaintiff for his cause of action, his Title IX claims are effectively preempted by the administrative scheme and procedural requirements of Title VII. To allow the Plaintiff to veil his Title VII claims under Title IX would, in essence, allow him to circumvent the "precisely drawn, detailed enforcement structure of Title VII by simply filing suit under . . . Title IX, when the underlying facts make suit under Title VII available." *Lakoski v. James*, 66 F.3d 751, 753 (5th Cir. 1995). This circumvention would permit him to bring what is, on its face, a Title VII claim without adhering to the same rules that are required of every other employment discrimination plaintiff in the country.

In *Blalock v. Dale County Bd. of Educ.*, 84 F. Supp. 2d 1291 (M.D. Ala. 1999)(DeMent, J.), the court agreed with the other courts that had decided this issue that the plaintiff's

exclusive remedy for monetary damages and injunctive relief was under Title VII. By rejecting both the plaintiff's Title IX and Title VII claims, the court precluded the plaintiff from bringing her Title IX action for damages and equitable relief. *Blalock*, 84 F. Supp. 2d at 1298-99.

In the instant case, the Plaintiff attempts to assert a Title IX claim of gender discrimination. The Plaintiff asserts these theories solely to seek redress for alleged gender-based discrimination in the workplace. He attempts to cloak what is in reality a Title VII claim, under the guise of Title IX because he failed to timely file an EEOC charge of discrimination to trigger a Title VII lawsuit. Based on the foregoing, Plaintiff's Title IX claim is due to be dismissed in its entirety.

IV. PLAINTIFF FAILS TO ASSERT A PRIMA FACIE CASE OF RETALIATION UNDER TITLE IX

The Plaintiff has failed to state a prima facie case of retaliation under Title IX. To assert a retaliation claim under Title IX, a plaintiff must demonstrate that: "(1) she engaged in statutorily protected expression, (2) that there was a subsequent adverse employment action, and that (3) some causal relation exists between the protected expression and the adverse action." *Meeks v. Computer Assoc., Intern.* 15 F.3d 1013, 1021 (11th Cir. 1997). In the instant case, the Plaintiff's pleadings do not make an adequate showing of a subsequent adverse employment action, particularly, as the Plaintiff is remains an active employee of the Board.[2] Furthermore, there is no causal relation between the alleged protected expression and the adverse action as the Plaintiff failed to allege any form of protected expression. Without more than the bare-bones allegations of his Complaint, the

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[2] Under Alabama, a Board's action terminating coaching duties does not constitute a transfer or demotion. *Bryan v. Alabama State Tenure Commission*, 472 So. 2d 1052, 1054 (Ala. Civ. App. 1985).

Plaintiff has failed to state a prima facie case of retaliation under Title IX.

Based on the foregoing, the Plaintiff's retaliation claims under Title IX are due to be dismissed.

V. PLAINTIFF CANNOT RECOVER PUNITIVE DAMAGES AGAINST THE BOARD

The United States Supreme Court has addressed the question whether the damage under Title IX remedy may include an award of punitive damages. Because of the paucity of lower court authority on this point, we approach this question by analogy to comparable civil rights statutes. *Doe v. Petaluma City School District,* 830 F. Supp. 1560, 1576 (N.D. Cal. 1993), *rev'd o.g.*, 54 F.3d 1447 (9th Cir. 1995); *Boughre v. University of Pittsburgh,* 713 F. Supp. 139 (W.D. Pa. 1989), *aff'd,* 882 F.2d 74 (3rd Cir. 1989). We further noted that in claims brought under § 1983 — which, like Title IX, does *not* contain a specific damage provision — , only compensatory and not punitive damages may be recovered form a public entity defendant. *E.g., Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 101 S. Ct. 2748 (1981); *Colvin v. McDougall,* 62 F.3d 1316, 1319 (11th Cir. 1995).

In *City of Newport*, the Supreme Court examined first the traditional immunity of municipal corporations form punitive damages at common law, and then whether considerations of public policy presently dictated a contrary result. The Court noted the distinction at common law between liability to compensate for injures inflicted and "vindictive damages" to punish the actual wrongdoers, and found that "courts viewed punitive damages [against municipal corporations] as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised." 453 U.S. at 263.

The Court further found no policy consideration sufficient to alter the established common law rule:

> Regarding retribution, it remains true that an award of punitive damages against a municipality "punishes" only the taxpayers, who took no part in the commission of the tort. These damages are assessed over and above the amount necessary to compensate the injured party.... Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.

Id. at 267 (citation omitted).

Although the Supreme Court has not addressed whether punitive damages may properly be assessed against other public entities under §1983 or other civil rights statutes, lower courts have held the same policy considerations apply equally to bar awarding punitive damages against counties under §1983, *e.g., Colvin,* 62 F.3d at 1319, or against municipal school boards under Title VI of the Civil Rights Act of 1964. *E.g., Singh v. Superintending School Committee of the City of Portland,* 601 F. Supp. 865, 867 (D. Me. 1985).

In this Title IX action, as in §1983 actions against public entities, any award of punitive damages would be, in effect, a windfall to a fully compensated Plaintiff. Moreover, the weight of such a remedy imposed against a state school board (such as the Birmingham Board of Education) would fall ultimately on the shoulders of the Board's student body and faculty, which would bear the brunt of any reduction in other services caused by punitive damages awarded on top of any make-whole or compensatory relief.

The conclusion that punitive damages are not recoverable from a public entity (especially a state agency) is bolstered by the passage of the 1991 amendments to Title VII. In passing the Civil Rights Act of 1991, Congress created a damage remedy for plaintiffs who were victims of intentional discrimination, *see* 42 U.S.C. §1981A(b)(1) (Civil Rights Act of 1991); but in so doing, Congress made clear its intent that punitive damages, although recoverable from private defendants, could *not* be awarded against a governmental entity. *See* 137 Cong. Rec. S15, 484 (Oct. 30, 1991) (Kennedy-Danforth interpretive memorandum) (same); 164 Cong. Rec. H9527 (Nov. 7, 1991) (Edwards interpretive memorandum) (same).

Although Congress in 1986 abrogated state sovereign immunity in suits under Title IX, *see* 42 U.S.C. 2000d-7, nothing in that statute nor in its legislative history reflected any intent to make a state university subject to punitive damages under Title IX. By analogy to §1983 and Title VII, punitive damages cannot be recovered from the Board under Title IX.

WHEREFORE PREMISES CONSIDERED

Defendant Birmingham Board of Education respectfully requests that this Court dismiss Plaintiff's Complaint and Amended Complaint with prejudice, enter judgment for the Board and against Plaintiff, and award Defendant their cost of suit, including reasonable attorneys' fees for defending this action, and all other and further relief, both general and specific, to which the Board may justly be entitled.

Respectfully submitted,

/s/ Valerie L. Acoff
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VALERIE L. ACOFF
DARNELL D. COLEY
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing by placing a true and correct copy of same in the United States Mail, postage prepaid and properly addressed on this the 10th day of September, 2001, to the following:

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/s/ Valerie L. Acoff
OF COUNSEL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RODERICK JACKSON,	*
	*
Plaintiff,	*
v.	***CASE NO.**
	***CV-01-TMP-1866-S**
	*
BIRMINGHAM BOARD OF EDUCATION,	*
	*
	*
Defendant.	*

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

COMES NOW the plaintiff, Roderick Jackson, by and through his undersigned counsel, and responds to the defendant's Motion to Dismiss as follows:

Procedural Issues

1. Plaintiff's initial complaint, filed into court on July 27, 2001, alleges a retaliation claim based on Title IX of the Act of Congress known as the "Education Amendment Act of 1972, as amended." The only reference made to Title VII was in ¶ 4 and was clearly a typographical error when taken in context.[1] Plaintiff is not bringing a Title VII claim in this lawsuit, as Title VII does not provide any remedy for Plaintiff 's claims.

[1] The phrase ". . . entity subject to suit under Title VII of the Act of Congress known as the 'Education Amendment Act of 1972. . . " was clearly intended to read Title IX, and not Title VII.

2. On July 30, 2001, Plaintiff filed an Amended Complaint, solely at the request of the Clerk of the District Court, to correct the names of the parties being served. There was no substantive change to the complaint itself.

3. Lastly, the defendant argues that plaintiff was not terminated as he is "still employed with the Board." While it is true that Plaintiff is still employed as a tenured instructor, Plaintiff was terminated from his position as an athletic coach, and it is about this adverse employment action that plaintiff complains.

Plaintiff's Standing to Assert Title IX Claim

The defendant's first argument is that Plaintiff lacks standing to bring a Title IX claim because he has not shown any personal injury. "If a defendant moves to dismiss a complaint for lack of standing, a court must accept as true all of the plaintiff's material allegations." Bischoff v. Osceola County, Fla., 222 F.3d 874, 879 (11th Cir. 2000).

In plaintiff's complaint, as amended, he alleges he received negative evaluations and was terminated, both of which are adverse employment actions. Hence, taking the plaintiff's allegations as true, Plaintiff has shown personal injury sufficient to establish standing. Any factual dispute as to whether Plaintiff actually received any negative evaluations or whether he was terminated from his position as a coach is not to be resolved by the Court. Id. Therefore, the defendant's argument that plaintiff lacks standing is without merit and its Motion to Dismiss is due to be denied.

Plaintiff's Claim under Title IX

Plaintiff's claim under Title IX is based solely on retaliation. Plaintiff is not alleging he was discriminated against because of his sex, but rather that he was retaliated against for opposing the Defendant's non-compliance with Title IX. Title IX provides in pertinent part that "[n]o person

in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §1681(a). The administrative regulations promulgated by the Department of Education for the purpose of implementing and enforcing Title IX "prohibit retaliation against any individual who has made a complaint, testified, or participated in any manner in an investigation into alleged noncompliance with Title IX." *See* 34 C.F.R. § 100.7(e). Lowrey v. Texas A & M University System, 117 F.3d 242, 249 (5th Cir. 1997). Hence, Title IX affords a private right of action for retaliation against the employees of federally funded educational institutions. Id.

Plaintiff alleges that the defendant was in violation of Title IX in several ways: (1) by prohibiting the girls' athletic teams from using certain equipment, (2) by refusing the girls' athletic teams the same access to the sports facilities, and (3) by committing serious infractions with regards to the girls' athletic teams' expenses accounts. Plaintiff further alleges that he complained about these violations and gender discrimination to his supervisor and subsequently, at least two forms of adverse employment action occurred, (1) he received negative evaluations and (2) his job as coach was terminated.

A court may dismiss a complaint for failure to state a claim "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations in the complaint." *See* Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L.Ed.2d 59 (1984); *see also* Wright v. Newsome, 795 F.2d 964, 967 (11th Cir.1986) ("[W]e may not ... [dismiss] unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims in the complaint that would entitle him or her to relief.") (citation omitted).

The court must accept as true all well-pleaded factual allegations and will view them in a light most favorable to the nonmoving party. Williams v. City of Montgomery, 21 F.Supp.2d 1360, 1363 (M.D.Ala. 1998) (citing Hishon, 467 U.S. at 73, 104 S. Ct. 2229). Furthermore, the threshold is "exceedingly low" for a complaint to survive a motion to dismiss for failure to state a claim. Ancata v. Prison Health Services, Inc., 769 F.2d 700, 703 (11th Cir.1985).

Therefore, accepting the factual allegations as true and viewing them in a light most favorable to the nonmoving party, Plaintiff has stated a claim for Title IX retaliation. Hence, the defendant's Motion to Dismiss is due to be denied.

Title VII Does Not Provide a Remedy for Plaintiff

The defendant's third argument is that Title VII provides Plaintiff the exclusive remedy for his claims of discrimination. However, this very issue has been addressed by the courts. In Blalock v. Dale County Bd. of Educ., 84 F.Supp.2d 1291 (M.D.Ala. 1999), the Middle District recognized that a Title IX claim seeking redress for retaliation "requires a slightly different analysis" when determining whether Title VII precludes the Title IX action. Id. at 1299.

In its analysis, the Middle District stated that "[t]he Fifth Circuit distinguished between a retaliation claim for opposing employment discrimination practices and a retaliation claim for opposing practices under Title IX." Id. The Fifth Circuit held that:

> . . . the anti-retaliation provisions of titles VII and IX are not identical, and [T]itle VII provides no remedy for retaliation against individuals who raise charges of noncompliance with the substantive provisions of [T]itle IX. Title VII prohibits retaliation only against individuals who oppose discriminatory employment practices or

> participate in complaints or investigations of employment practices prohibited by [T]itle VII. . . . Title VII provides no remedy, however, to employees of federally funded educational institutions who have suffered retaliation as a consequence of their opposition to noncompliance with [T]itle IX. Consequently, [the plaintiff] asserts a cause of action for retaliation that arises exclusively under [T]itle IX, without a corollary right under [T]itle VII. Under such circumstances, [T]itle VII does not preempt [T]itle IX.

Lowrey, 117 F.3d at 248-249.

Hence, pursuant to the standard articulated in Blalock and Lowrey, Plaintiff's Title IX retaliation claim is not precluded by Title VII, therefore the defendant's Motion to Dismiss based on these grounds is due to be denied. Lastly, Plaintiff does not dispute that he cannot recover punitive damages against the defendant under Title IX and hereby rescinds any demand for punitive damages stated in his complaint.

WHEREFORE, Premises Considered, Plaintiff respectfully requests that the defendant's Motion to Dismiss be denied.

Respectfully Submitted,

/s/ Toni J. Braxton
Toni J. Braxton (HOR034)

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RODERICK JACKSON,	*
	*
Plaintiff,	*
v.	*CASE NO.
	*CV-01-TMP-1866-S
	*
BIRMINGHAM BOARD OF EDUCATION,	*
	*
	*
Defendant.	*

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing on the counsel of record for the opposing party, by U.S. mail, first class postage prepaid and properly addressed on this the _____ day of September, 2001.

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/s/ Toni J. Braxton
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RODERICK JACKSON, Plaintiff, vs. BIRMINGHAM BOARD OF EDUCATION, Defendant.	CIVIL ACTION NO.: CV-01-TMP-1866-S

REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Defendant Birmingham Board of Education ("Board"), files this Reply Brief in support of its Motion to Dismiss. In support of its Motion, and without waiving any claims that might be asserted later, the Board states the following:

I. The Issues Have Been Narrowed, But The Complaint Still Fails to State a Claim

Plaintiff's Response to Defendant's Motion to Dismiss has narrowed and clarified the issues, but it is not adequate to cure the defects in the Complaint. As presently constituted, the Complaint fails to establish that Plaintiff has standing and fails to state a claim for which relief can be granted. Therefore, the Complaint should be dismissed as a matter of law.

It now appears that Plaintiff's sole claim is for retaliation under Title IX of the Education Amendment Act of 1972, 20 U.S.C. § 1681(a). Plaintiff has disclaimed any reliance on or

claim under Title VII as well as any claim that he was discriminated against based on his sex. Instead, his claim is that he was retaliated against for opposing the Board's alleged non-compliance with Title IX. Importantly, Plaintiff has conceded that punitive damages may not be recovered against the Board.

II. Plaintiff Lacks Standing to Assert a Title IX Claim

As discussed in the Motion to Dismiss, Plaintiff's Title IX claims are due to be dismissed as a matter of law because Plaintiff has failed to establish that he has standing to assert a Title IX claim. In his Response, Plaintiff concedes that he is not asserting a substantive claim under Title IX on behalf of the members of the girls basketball team. (Response, P. 2). His only claim is for retaliation, but Plaintiff has failed to establish that he suffered an injury cognizable under Title IX. *E.g.*, *Grin v. Dugger,* 823 F.2d 1476, 1482-91 (11th Cir. 1987).

III. Plaintiff Fails to State a Claim under Title IX

The Complaint fails to state a claim for relief under Title IX for two reasons, one procedural and one substantive. First, the Complaint does not clearly allege all the elements of a retaliation claim. More importantly, Title IX does not support a private cause of action for retaliation against an employee.

A. There Is No Private Cause of Action under Title IX for Discrimination Against Employees

Plaintiff's argument on this central issues relies on a district court case from the Middle District of Alabama and a single case from the Fifth Circuit. Plaintiff failed, however, to address the only case from the Northern District of Alabama which has addressed claims for retaliation under Title IX, *Holt v. Lewis*, 955 F. Supp. 1385 (N.D. Ala. 1995). In a cogent and well-reasoned analysis, Judge Acker concluded that there was no private cause of action for

retaliation. *Holt,* 955 F. Supp. at 1389. Judge Acker began his analysis of private whistle blower suits under Title IX with the language of the statute, which provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Holt, 955 F. Supp. at 1388, *quoting,* 20 U.S.C. §1681(a).

Judge Acker went on to compare the remedies and protections of Title IX with those of Title VII and concluded that there is no implied private right of action for retaliation. *Holt,* 955 F. Supp. at 1389. There is no express statutory remedy for retaliation under Title IX, and only a limited private right of action by victims of direct discrimination. *See, Cannon v. Univ. of Chicago,* 441 U.S. 677, 717, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979); *see also, Franklin v. Gwinnett County Pub. Sch.,* 503 U.S. 60, 112 S. Ct. 1028, 1032, 117 L. Ed. 2d 208 (1992).

Judge Acker noted that neither the Supreme Court nor the Eleventh Circuit has recognized a cause of action for retaliatory discharge under Title IX. *Holt,* 955 F. Supp. at 1388. He then compared the provisions of Title IX and Title VII:

> Unlike the creators of § 2000e-3(a) of Title VII, the congressional authors of Title IX failed to include any express protections against retaliation when considering the problems of gender equity in our nation's educational institutions. This failure to speak is significant when compared to § 2000e-3, a vital piece of the Title VII safeguards enacted only eight years prior to Title IX. When presented with such a stark contrast in otherwise closely related

> civil rights legislation, it is helpful to keep in mind that "congressional consideration of an issue in one context, but not another, in the same or similar statutes implies that Congress intends to include that issue only where it has so indicated." *United States v. Azeem,* 946 F.2d 13, 17 (2d Cir. 1991). Congress has shown that where it intends to outlaw retaliation in the protection of civil rights, it will do so. Plaintiff has failed to persuade this court that the omission of such protection from Title IX is a mere oversight.
>
> Having said this, this court acknowledges a limited trend by other courts that recognize "retaliation" claims under Title IX. *See Preston v. Commonwealth of Va. ex rel. New River Community College,* 31 F.3d 203 (4th Cir. 1994); *Clay v. Bd. of Trustees of Neosho Community College,* 905 F. Supp. 1488, 1995 WL 646537 (D. Kan. 1995). The standard bearer for this trend and the case primarily relied upon by plaintiff for arguing that such a cause of action exists is Preston. Beside the obvious statement that Fourth Circuit law is not binding precedent in this case, this court respectfully declines to be swept up in this trickle and expressly refuses to turn it into a veritable flood by creating a second layer of implied theory of liability by expanding dramatically upon a non-binding opinion which created an implied cause of action only within the Fourth Circuit.

Holt, 955 F. Supp. at 1388.

Judge Acker's opinion gave little weight to administrative regulations that purport to create a private cause of action under Title IX. The opinion found the link to be "tortured" and its effect outweighed by the argument that Congress knows how to create remedies for retaliation when

it chooses, as evidenced by the different approach used in Title VII. *Holt*, 955 F. Supp. at 1389.

Holt was decided before *Lowery v. Texas A&M Univ. Sys.*, 117 F.3d 242 (5th Cir. 1997), but *Lowery* does not challenge the analysis in *Holt*. The analysis in *Lowery* and *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1995), turned on whether Title IX was preempted by Title VII and whether Title IX could be used to circumvent the remedial scheme of Title VII. Neither of those cases discussed the more fundamental question of whether an implied private cause of action for retaliation is even allowable under Title IX. We have been unable to locate any binding Eleventh Circuit case which acknowledges the availability of an implied private cause of action for retaliation under Title IX.[1]

B. **Plaintiff Fails to Assert a Prima Facie Case of Retaliation under Title IX**

Plaintiff has failed to state a prima facie case of retaliation under Title IX. To assert a retaliation claim under Title IX, a plaintiff must demonstrate that: "(1) she engaged in statutorily protected expression, (2) that there was a subsequent adverse employment action, and that (3) some causal relation exists between the protected expression and the adverse action." *Meeks v. Computer Assoc. Int'l.*, 15 F.3d 1013, 1021 (11th Cir. 1994). In the instant case, the Complaint does not make an adequate showing of a causal relation between the protected activity and the subsequent adverse employment action.

[1] There are several district court cases, discussed in the Board's Motion and Plaintiff's Response which discuss Title VII preemption, but no Eleventh Circuit cases. There are also no district court cases from this circuit discussing the more fundamental approach used in *Holt*.

The Complaint contains no allegation of a causal relation between the alleged protected activity[2] and the alleged adverse action. Nor does it allege any facts from which retaliation can be reasonably inferred. There is simply an allegation that the loss of the coaching position occurred about five months after the complaints of discrimination. Moreover, there is no allegation that any members of the Board or the Superintendent, who made the decision concerning Plaintiff's coaching duties, were aware of the complaints to Ms. Baugh. Without some allegations to connect the protected activity with the adverse action, the claim must fail.[3]

Based on the foregoing, the Plaintiff's retaliation claims under Title IX are due to be dismissed.

WHEREFORE, PREMISES CONSIDERED, Defendant Birmingham Board of Education respectfully requests that this Court dismiss Plaintiff's Complaint and Amended Complaint with prejudice, enter judgment for the Board and against Plaintiff, and award Defendant their cost of suit, including reasonable attorneys' fees for defending this action, and all other and further relief, both general and specific, to which the Board may justly be entitled.

[2] The Complaint does not clearly set forth facts form which it can be determined that the girls team was in fact treated less favorably than the corresponding boys team. For example, the Complaint alleges that certain facilities were prohibited to the girls team, but does not allege that the boys team had superior access to this equipment or access to better practice times and facilities. Nor does the Complaint explicitly allege that the lack of equipment and facilities was a result of gender discrimination. Nonetheless, we will assume for present purposes that the allegations meet the "exceedingly low" threshold for surviving a motion to dismiss.

[3] Defendant had legitimate non-discriminatory reasons for the termination of Plaintiff's coaching duties; however, these reasons involve evidentiary issues that may be addressed at a later date, if this case survives this dispositive motion.

Respectfully submitted,

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OF COUNSEL

IN THE UNITED STATES DISTRICT COURT
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RODERICK JACKSON,	*
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Plaintiff,	*
v.	*CASE NO.
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BIRMINGHAM BOARD OF	*
EDUCATION,	*
	*
Defendant.	*

PLAINTIFF'S REPLY TO DEFENDANT'S REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

COMES NOW the plaintiff, Roderick Jackson, by and through his undersigned counsel, and responds to the Defendant's Reply Brief in Support of Defendant's Motion to Dismiss as follows:

Plaintiff's claim under Title IX is based solely on retaliation. Plaintiff is not alleging he was discriminated against because of his sex, but rather that he was retaliated against for opposing the Defendant's non-compliance with Title IX. Title IX provides in pertinent part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §1681(a). The administrative regulations promulgated by the Department of Education for the purpose of implementing and enforcing Title IX "prohibit retaliation against any individual who has made a complaint, testified,

or participated in any manner in an investigation into alleged noncompliance with Title IX." *See* 34 C.F.R. § 100.7(e). Lowrey v. Texas A & M University System, 117 F.3d 242, 249 (5th Cir. 1997). Hence, Title IX affords a private right of action for retaliation against the employees of federally funded educational institutions. Id.

Plaintiff alleges that the defendant was in violation of Title IX in several ways: (1) by prohibiting the girls' athletic teams from using certain equipment, (2) by refusing the girls' athletic teams the same access to the sports facilities, and (3) by committing serious infractions with regards to the girls' athletic teams' expenses accounts. Plaintiff further alleges that he complained about these violations and gender discrimination to his supervisor and subsequently, at least two forms of adverse employment action occurred, (1) he received negative evaluations and (2) his job as coach was terminated.

A court may dismiss a complaint for failure to state a claim "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations in the complaint." *See* Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L.Ed.2d 59 (1984); *see also* Wright v. Newsome, 795 F.2d 964, 967 (11th Cir.1986) ("[W]e may not ... [dismiss] unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims in the complaint that would entitle him or her to relief.") (citation omitted).

The court must accept as true all well-pleaded factual allegations and will view them in a light most favorable to the nonmoving party. Williams v. City of Montgomery, 21 F.Supp.2d 1360, 1363 (M.D.Ala. 1998) (citing Hishon, 467 U.S. at 73, 104 S. Ct. 2229). Furthermore, the threshold is "exceedingly low" for a complaint to survive a motion to dismiss for failure to state a claim. Ancata v. Prison Health Services, Inc., 769 F.2d 700, 703 (11th Cir.1985).

The defendant cites a decision by Judge Acker in Holt v. Lewis, 955 F.Supp. 1385 (N.D. Ala. 1995) as standing for the proposition that there is no private cause of action for retaliation. Although Judge Acker acknowledged a trend by other courts to recognize retaliation claims under Title IX, he chose to take a different approach. It should be noted that Judge Acker made a similar analysis that was reversed by the Eleventh Circuit in Andrews v. Lakeshore Rehabilitation Hosp., 140 F.3d 1405 (11th Cir. 1998) .

In Andrews, Judge Acker *sua sponte* dismissed the plaintiff's retaliation claim as not cognizable under section 1981. Id. at 1407. As in the present case, the Eleventh Circuit had "not yet addressed the types of retaliation claims cognizable under § 1981 in light of the Civil Rights Act of 1991." Id. at 1411. However, the Eleventh Circuit noted that two cases from other circuit courts appeared to presume that a retaliation claim may be brought under the amended section 1981. Id. at 1411, fn. 13. The Eleventh Circuit then held that the plaintiff's retaliation claim could proceed under section 1981, and reversed the District Court. In the instant case, the Fifth Circuit has addressed this issue directly, in a case decided two years after Judge Acker's decision in Holt. Following the reasoning of the Fifth Circuit, accepting the factual allegations as true and viewing them in a light most favorable to the nonmoving party, Plaintiff has stated a claim for Title IX retaliation. Hence, the defendant's Motion to Dismiss is due to be denied.

WHEREFORE, Premises Considered, Plaintiff respectfully requests that the defendant's Motion to Dismiss be denied.

Respectfully Submitted,

/s/ Toni J. Braxton
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IN THE UNITED STATES DISTRICT COURT
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RODERICK JACKSON,	*
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Plaintiff,	*
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BIRMINGHAM BOARD OF EDUCATION,	*
	*
	*
Defendant.	*

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I hereby certify that I have served a copy of the above and foregoing on the counsel of record for the opposing party, by U.S. mail, first class postage prepaid and properly addressed on this the 17th day of October, 2001.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RODERICK JACKSON, Plaintiff, vs. BIRMINGHAM BOARD OF EDUCATION, Defendant.	CIVIL ACTION NO.: CV-01-TMP-1866-S

DEFENDANT'S BRIEF IN SUPPORT OF MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Defendant Birmingham Board of Education ("Board"), files this Brief in Support of the Magistrate Judge's Report and Recommendation. For the reasons discussed below, the Complaint should be dismissed for failure to state a claim.

I. Facts and Standard of Review

The Magistrate's Report does not make any findings of fact, presumably because the decision concerns a motion to dismiss and all allegations are accepted as true. The Board does not take issue with the standard of review set forth in the Plaintiff's Memorandum of Law in Support of Plaintiff's Objection to Magistrate Judge's Report and Recommendation (the "Memorandum of Law"). Even under this standard of review, the complaint is due to be dismissed

because the Plaintiff fails to state a claim for which relief can be granted.

The Plaintiff has acknowledged that his sole claim is for retaliation under Title IX of the Education Amendment Act of 1972, 20 U.S.C. § 1681(a). [1] Memorandum, at 3.[2]

II. Plaintiff Fails to State a Claim under Title IX

The Complaint fails to state a claim for relief under Title IX for two reasons. First, and most importantly, Title IX does not support a private cause of action for retaliation. In addition, if the first point is not dispositive, the Complaint does not clearly allege all of the elements of a retaliation claim.

A. There Is No Private Cause of Action under Title IX for Retaliation.

The Magistrate's Report concludes that there is no private cause of action for retaliation under Title IX. That conclusion was based on the only case from the Northern District of Alabama which has addressed this issue. *Holt v. Lewis,* 955 F. Supp. 1385 (N.D. Ala. 1995), *aff'd,* 109 F.3d 771 (11th Cir. 1997) *(table), cert. denied,* 522 U.S. 817, 118 S. Ct. 67 (1997). The Magistrate's Report noted that he found *Lowery v. Texas A&M Univ.* Sys., 117 F.3d 242 (5th Cir. 1997), to be persuasive, but felt bound by *Holt.*

The Magistrate's Report is right to follow *Holt,* but wrong in finding *Lowrey* persuasive. The *Holt* opinion is

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[1] Section 1681 provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

[2] This concession moots any discussion of whether the Plaintiff has standing to sue with respect to the alleged discrimination suffered by the members of the girl's basketball team.

both cogent and prescient. By focusing on the text of the statute, *Holt* anticipated *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511 (2001), which is dispositive.[3]

Alexander dramatically restricted the reach of implied private rights of action when it held that there was not an implied private right of action for disparate impact discrimination under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.[4] The Supreme Court focused on the text of the statute and the court's

> understanding of the genesis of private causes of action. Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right, but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy or how compatible with the statute.

Alexander, 121 S. Ct. at 1519-20 (citations omitted).

The Court's analysis began and ended with the text and structure of Title VI. *Alexander* noted that section 601 prohibits intentional discrimination, but does not prohibit disparate impact.[5] Thus, there was a private right to enforce

[3] The *Holt* opinion gave little weight to administrative regulations that purport to create a private cause of action under Title IX. *Holt*, 955 F. Supp. at 1389.

[4] Title VI was found to be the model for Title IX, *Alexander*, 121 S. Ct. at 1515-16; *See, Cannon v. Univ. of Chicago*, 441 U.S. 677, 717, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979).

[5] Section 601 provides in pertinent part that no person "shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any

section 601's prohibition against intentional discrimination, *see, Cannon v. Univ. of Chicago*, 441 U.S. 677, 717, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979), but no basis for a private right of action to recover for disparate impact discrimination. The only prohibition against disparate impact discrimination was contained not in the statute, but in the regulations enacted under § 602, which authorized federal agencies to issue regulations to effectuate the provisions of § 601. The regulations at issue did expressly prohibit disparate impact.

The Court concluded that regulations could not support a private cause of action in the absence of congressional intent to create such a cause of action. Interpretative regulations can validly be used to define what the statute does or does not prohibit, but they cannot create a right that Congress did not. *Alexander*, 121 S. Ct. at 1522. The use of private rights of action to enforce interpretative regulations is legitimate because the action is really enforcing the statute itself. The regulations only serve to interpret what the statute meant. Regulations such as those under § 602 go further and create new rights beyond what Congress created. That is demonstrated by the fact that § 601 did not prohibit disparate impact discrimination. The administrative could not support private rights of action to prohibit conduct that the statute permitted.

We have been able to find only two cases considering the effect of *Alexander* on retaliation claims under Title IX. *Litman v. George Mason University*, 131 F. Supp. 2d 795 (E.D. Va. 2001); *Atkinson v. Lafayette College*, 2002 WL 123449 (E.D. Pa. January 29, 2002). Both firmly held that Title IX did not create a private right of action for retaliation.

Litman noted that Title IX was intended to be interpreted and enforced in the same manner as Title VI. *Id.*, 131 F.

or activity" covered by Title VI. 42 U.S.C. § 2000d. *See Alexander v. Choate*, 469 U.S. 287, 293, 105 S. Ct. 712 (1985).

Supp. 2d at 581; *Alexander*, *supra*, *Cannon*, *supra*. Thus, Alexander is controlling with respect to private rights under Title IX. Title IX does not contain a prohibition against retaliation.[6] The only prohibition against retaliation is contained in regulations promulgated under § 902. 20 U.S.C. §1682. Relying on *Alexander*, the *Litman* court held that the regulations could not create an implied private right of action for retaliation. Administrative regulations cannot create a private right of action to prohibit an act (e.g., retaliation) not prohibited by the statute. Only Congress can create a federal right or a means of enforcing a federal right.

Litman also determined that "retaliation" is not the same as discrimination. Although Title VII defines discrimination to include retaliation, that is based on specific language in the statute and is not applicable to Title IX. Moreover, the anti-retaliation provision in Title VII is narrowly focused on retaliation concerning noncompliance with Title VII and is limited by the complex remedial scheme under Title VII. Therefore, Title VII was not instructive with respect to retaliation under Title IX. Therefore, *Litman* concluded that there was no private remedy for retaliation under Title IX.

The holdings in *Alexander*, *Litman*, *and Atkinson* suggest that *Lowery v. Texas A&M Univ. Sys.*, 117 F.3d 242 (5th Cir. 1997), is no longer good law to the extent that it recognizes a private right of action for retaliation under Title IX. The court need not, however, reach that question because *Lowery* is not binding on this court and because the foregoing authorities corroborate the holding of *Holt* that there is no

[6] Title IX provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. 20 U.S.C. § 1681 (a)

private right of action for retaliation under Title IX. Therefore, the suit is due to be dismissed.

B. Plaintiff Fails to Assert a Prima Facie Case of Retaliation under Title IX

To the extent that there remains any doubt, the Court should note that the Plaintiff has failed to state a prima facie case of retaliation under Title IX. To assert a retaliation claim under Title IX, a plaintiff must demonstrate that: "(1) she engaged in statutorily protected expression, (2) that there was a subsequent adverse employment action, and that (3) some causal relation exists between the protected expression and the adverse action." *Meeks v. Computer Assoc. Int'l*, 15 F.3d 1013, 1021 (11th Cir. 1994). In the instant case, the Complaint does not make an adequate showing of a causal relation between the protected activity and the subsequent adverse employment action.[7]

The Complaint contains no allegation of a causal relation between the alleged protected activity and the alleged adverse action. Nor does it allege any facts from which retaliation can be reasonably inferred. There is simply an allegation that the loss of the coaching position occurred about five months after the complaints of discrimination. Moreover, there is no allegation that any members of the Board or the Superintendent, who made the decision concerning Plaintiff's coaching duties, were aware of the complaints to Ms. Baugh. Without some allegations to

[7] The Complaint does not clearly set forth facts form which it can be determined that the girls team was in fact treated less favorably than the corresponding boys team. For example, the Complaint alleges that certain facilities were prohibited to the girls team, but does not allege that the boys team had superior access to this equipment or access to better practice times and facilities. Nor does the Complaint explicitly allege that the lack of equipment and facilities was a result of gender discrimination. Nonetheless, we will assume for present purposes that the allegations meet the "exceedingly low" threshold for surviving a motion to dismiss.

connect the protected activity with the adverse action, the claim must fail.[8]

Based on the foregoing, the Plaintiff's retaliation claim under Title IX is due to be dismissed.

WHEREFORE, PREMISES CONSIDERED, Defendant Birmingham Board of Education respectfully requests that this Court dismiss Plaintiff's Complaint and Amended Complaint with prejudice, enter judgment for the Board and against Plaintiff, and award Defendant their cost of suit, including reasonable attorneys' fees for defending this action, and all other and further relief, both general and specific, to which the Board may justly be entitled.

Respectfully submitted,

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[8] Defendant had legitimate non-discriminatory reasons for the termination of Plaintiff's coaching duties; however, these reasons involve evidentiary issues that may be addressed at a later date, if this case survives this dispositive motion.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing by placing a true and correct copy of same in the United States Mail, postage prepaid and properly addressed on this the 4th day of February, 2002, to the following:

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